SUPREME COURT OF THE UNITED STATES.

No. 293

MILTON LUM, PLAINTIFF IN ERROR,

vs.

WILLIAM ROBERTSON, USE OF ALEXANDER C. FERGUSON.

IN ERROR TO THE DISTRICT COURT U. S. FOR THE EASTERN DISTRICT OF TEXAS.

G. S. GIDEON, Printer, 511 Ninth street, Washington, D. C.

If this is a correct statement of the case, as it is believed to be, there would seem to be no room for doubt of Baldwin's right to the relief asked for and awarded by the decree.

Larney with WM. P

Counsel for

SUPREME COURT OF THE UNITED STATES.

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Caption.

UNITED STATES OF AMERICA.

District court of the United States, eastern district of Texas, to wit:

At a term of the United States district court, begun and held in the city of Galveston, in and for the eastern district of Texas, on the first Monday in the month of May, A. D. 1859, to wit, on the first day of June, A. D. 1859, it being a day of said term of May. Present, the honorable John C. Watrous, judge; George Mason, esq., U. S. district attorney; Henry E. McCulloch, U. S. marshal, and James Love, esq., clerk. Amongst other were the following proceedings:

In the matter of WILLIAM ROBERTSON,
for the use of A. C. FERGUSON,
vs.
MILTON M. LUM and LEWIS LUM.

Be it remembered, that *that* heretofore, on the 16th day of July, A. D. 1857, came the plaintiff, by his attorney, and filed his petition herein, in words and figures as follows:

District court of the United States, eastern district of Texas, at Galveston.

To the honorable John C. Watrous, judge of the district court of the United States, having and exercising the powers and jurisdiction of the circuit court of the same for the eastern district of Texas, sitting at Galveston:

The petition of William Robertson, who is a citizen of the State of Mississippi, and residing at the city of Natchez, in the said State, who sues herein for the use of Alexander C. Ferguson, who is a citizen of the said State of Mississippi, and residing at the said city of Natchez, therein complaining against Milton N. Lum and Lewis Lum, who are both citizens of the State of Texas, and residing in the county of Fort Bend, therein and hereinafter styled the defendants hereto, respectfully represents to your honor:

That, heretofore, to wit, on the seventeenth day of July, in the year eighteen hundred and fifty-one, at the said city of Natchez, the said defendants made their certain promissory note in writing, by them severally signed, and delivered the same to your petitioner, whereby they jointly and severally promised to pay to your petitioner, by the name and description of William Robertson, trustee of the Commercial Bank of Natchez, or order, in specie, the sum of nineteen hundred and sixty-seven 83-100 dollars, on

the seventeenth day of July, in the year eighteen hundred and fifty-three, for value received, payable at the banking-house of the New Orleans Canal and Banking Company, in the city of New Orleans.

And your petitioner further says, that, heretofore, to wit, on the said seventeenth day of July, in the year eighteen hundred and fifty-one, at the said city of Natchez, the said defendants made their certain other promissory note in writing, by them signed, and delivered the same to your petitioner, whereby they jointly and severally promised to pay to your petitioner, by the name and description of William Robertson, trustee of the Commercial Bank of Natchez, or order, in specie, the sum of two thousand and seventy-three 20-100 dollars, for value received, payable on the seventeenth day of July, in the year eighteen hundred and fifty-four, at the banking-house of the New Orleans Canal and Banking Company, in the city of New Orleans.

And your petitioner further says, that the respective times when the said promissory notes became due and payable are long since passed, but the said defendants, though often requested to pay the same, have hitherto failed and refused so to do, to the damage of your petitioners and the said Ferguson seven thousand dollars.

Wherefore, your petitioner prays your honor to cause the said Milton N. Lum and Lewis Lum to be duly cited to appear at the next term of this court, to be held at the city of Galveston, in the eastern district of Texas, on the first Monday of December next, then and there to answer to the premises, and that your petitioner may then have judgment for the use of the said Ferguson for the amount due by reason of the said promissory notes as principal and interest, at the rate of five per centum per annum, and costs of suit.

ALLEN & HALE,
Att'ys for Pl'ffs.

And afterwards, to wit, on the 16th day of July, A. D. 1857, a citation issued in this cause against the defendants, in words and figures as follows, to wit:

United States district court, eastern district of Texas.

The President of the United States of America to the marshal of the eastern district of Texas, or any of his lawful deputies, greeting:

You are hereby commanded to summon Milton M. Lum, if he be found in your district, to be and appear before the honorable the district court of the United States, at a court to be holden in and for the eastern district of Texas, at the city of Galveston, on the first Monday of December next, to answer the petition and complaint of William Robertson, who sues for the use of Alex-

ander C. Ferguson, against Milton M. Lum and Lewis Lum, in an action for damages in the sum of seven thousand dollars, of which you will serve the defendant, Milton M. Lum, with the accompanying copy of said petition.

Witness the honorable John C. Watrous, judge of said court, and the seal of said court. Done at the city of Galveston, this 16th day of July, A. D. 1857, and the eighty-second year of the independence of the United States of America.

[L. S.]

JAMES LOVE, *Clerk.*

And afterwards the marshal made his return on said citation in words and figures as follows: "Received on the 16th day of July, 1857, and on the fifth day of August, 1857, I executed this writ in Fort Bend county, by giving the defendant, Milton M. Lum, a true copy thereof, and a certified copy of the petition."

BEN. McCULLOCH, *U. S. M.*
By DAVID FERGUSON, *Deputy.*

And afterwards, on the 16th day of July, 1857, a citation issued in this cause, in words and figures as follows, to wit:

The United States district court, eastern district of Texas.

The President of the United States of America to the marshal of the eastern district of Texas, or any of his lawful deputies, greeting:

You are hereby commanded to summon Lewis Lum, if he be found in your district, to be and appear before the honorable the district court of the United States, at a court to be holden in and for the eastern district of Texas, at the city of Galveston, on the first Monday of December next, to answer to the petition and complaint of William Robertson, who sues for the use of Alexander C. Ferguson, against Milton M. Lum and Lewis Lum, in an action for damages in the sum of seven thousand dollars, of which you will serve the said defendant, Lewis Lum, with the accompanying copy of said petition.

Witness the Hon. John C. Watrous, judge of said court, and the seal of said court. Done at the city of Galveston, this 16th day of July, A. D. 1857, and the eighty-second year of the independence of the United States of America.

JAMES LOVE, *Clerk.*

And afterwards, the marshal made return on the said citation, in words and figures, as follows: "Received on the 16th day of July, 1857. November 23d, 1857. Returns, not to be found in my district."

BEN. McCULLOCH, *U. S. M.*
By DAVID FERGUSON, *Deputy.*

And afterwards, on the 12th day of July, 1858, the defendant, Milton M. Lum, by his attorney, filed the following plea:

United States district court, eastern dist. of Texas, at Galveston.

WILLIAM ROBERTSON, use of A. C. FERGUSON,
vs.
MILTON M. LUM et al.

Now comes the defendant, Milton M. Lum, by his attorneys, and says that the Commercial Bank of Natchez was a banking corporation, duly established by the laws of the State of Mississippi, and organized and doing business therein, but that under and by virtue of a law of said State, entitled "An act to prescribe the mode of proceeding against incorporated banks for a violation of their corporate franchises, and against persons pretending to exercise corporate privileges under acts of incorporation, and for other purposes," approved July 26, 1843; which said law is here referred to for greater certainty, and made part of this answer.

An information in the nature of a quo warranto was filed by the said State of Mississippi against the said Commercial Bank of Natchez, in the circuit court of Adams county, in said State, for the purpose of declaring and enforcing a forfeiture of the charter of said bank for the violation thereof, wherein and whereby such proceedings were had, that at the May term, 1845, of said court it was considered by the said court that the said Commercial Bank of Natchez do not in any manner further intermeddle with or concern themselves in or about the holding of or exercise the liberties, privileges, and franchises granted by the charter of said bank in said defendants' plea mentioned, but that the said bank be, and they were thereby absolutely forejudged and excluded from further holding or exercising the same; and it was further adjudged that all the said liberties, privileges, and franchises theretofore granted to the said bank, as set forth in the plea of said bank, be seized by the said State of Mississippi, and that all the property, books, and assets of said bank be seized and delivered to the trustees thereafter to be appointed, and that said trustees have execution therefor. And it was further ordered, that William Robertson (the plaintiff herein) be and was thereby appointed by the court trustee, upon his entering into bond with Stephen Duncan as his security, in the penal sum of twenty-five thousand dollars, which bond was filed and approved by the court, to take charge of the assets and books of said Commercial Bank of Natchez, wherever the same might be found, either in possession of said bank, or their officers, agents, trustees, or attorneys, to sue for and collect all debts due to said bank, and to sell and dispose of all property, real and personal, owned by said bank, or held by others for its use, at public auction, after giving twenty days' notice of the time and place of sale in some newspaper printed

and published in said State of Mississippi, and the proceeds of the debts when collected, and of the property when sold, to apply as might be thereafter directed by law, to the payment of the debts of said Commercial Bank of Natchez.

This defendant further says, that the foregoing and no other was the appointment power and authority of said William Robertson, as trustee of said Commercial Bank of Natchez, and that he never had any other right, title, or interest as said trustee, except such as was conferred by virtue of said appointment and order of said court, and the said act of July 26th, 1843, in accordance with which the same was made; that the promissory notes herein sued on were executed on account of an indebtedness to the said Commercial Bank, and the consideration thereof wholly and solely moved from, and was due to said bank, and that said notes were executed to said Robertson, plaintiff herein, in his official character and right as trustee as aforesaid, and in no other character or right, and without any personal right, title, or interest thereto or therein by s'd Robertson.

This defendant further says, that afterwards, to wit, at the November term, 1854, of the said circuit court of Adams county, Mississippi, such proceedings were had in the suit of the State of Mississippi against said Robertson, trustee of said bank, and in another suit in favor of John B. Nevitt and Adam L. Burgaman against said Robertson, trustee of said bank; that the said cause coming on to be heard, and the said court being fully advised of and concerning the premises, and it appearing to the satisfaction of the court that said Robertson had faithfully and fully discharged all his duties as such trustee, and had fully satisfied and paid all legal claims against the trust fund in his hands, and that there remained in the hands of said trustee the sum of $58,149 62 surplus, over and above all claims against said trust fund, and the court being of the opinion that said surplus is the property of and belongs to said State of Mississippi; but it appearing to the satisfaction of the court that the stockholders of said late Commercial Bank of Natchez were proceeding by bill in chancery to recover said surplus from said Robertson, and that debtors of said bank were proceeding to recover by action at law the sums by them paid, after said Robertson had collected funds sufficient to pay and satisfy all claims against said trust fund, it was therefore considered, ordered, adjudged, and decreed that the original report of said Robertson (the supplemental report filed on the 17th day of that present month) be and the same were thereby ratified and confirmed, and that the said Robertson be finally discharged and exonerated from all the rights and duties conferred upon him by virtue of his appointment as such trustee. And it was further ordered by the court that the clerk of said court transmit to the attorney general of the State of Mississippi a certified copy of said order, and that said William Robertson hold the said sur-

plus funds in his hands to abide the legal and equitable claims of the parties legally entitled to the said surplus funds then reported to remain unexpended in the hands of said Robertson.

This defendant further says, that suit was brought in the circuit court of the United States for the southern district of Mississippi by certain stockholders of said Commercial Bank of Natchez, on behalf of themselves and of all the other stockholders of said bank, who should make themselves parties thereto, against said William Robertson, plaintiff herein, trustee of said bank as aforesaid, and others; which said suit was number 256 on the chancery docket of said court, and entitled John Bacon et al. against William Robertson et al., and was for the purpose of recovering and distributing among the stockholders of said bank all the assets thereof in the hands of said trustee; and that in said suit such proceedings were duly had, that on the 15th day of May, 1856, by an interlocutory decree then pronounced, one Alexander C. Ferguson was duly appointed a receiver in said cause, upon his giving bond as therein provided. And the said William Robertson was ordered to deliver to the said Ferguson all the money, bonds, notes, deeds, accounts, choses in action, and property of all kinds which the said Robertson held as late trustee of the said Commercial Bank of Natchez, which said money, deeds, choses in action, and other property the said Ferguson, as receiver as aforesaid, was by the said decree empowered to hold and possess, which said decree is in full force, and the said Ferguson has duly qualified as receiver thereunder, and the said Robertson has duly delivered to the said Ferguson, in accordance therewith, the said promissory notes sued on herein.

And this defendant says, that the said William Robertson, as trustee as aforesaid, collected and received of the debts, effects, and property of said bank, an amount of money sufficient to pay the debts of the said bank, and all costs, charges, and expenses incident to the performance of his said trust, and did so pay the same, and thereby become punctus officio, and was further expressly removed from his said office as trustee as aforesaid, and by virtue of a decree of a court of competent jurisdiction, as hereinbefore shown, was ordered to, and did in fact deliver to the said Ferguson, as receiver as aforesaid, the same promissory notes herein sued on. Wherefore, this defendant says he is not bound to make other or further answer to plaintiffs' petition, and that the same should be dismissed; and of this he prays the judgment of the court.

BALLINGER & JACK,
Defendants' Attorneys.

William P. Ballinger, on oath, says, that the matters stated in the foregoing plea are true, in substance and in fact.

W. P. BALLINGER.

Sworn to and subscribed before me, this 12th day of July, 1858.

JOHN S. JONES,
U. S. Commissioner.

And afterwards, on the 15th day of July, 1858, the plaintiff filed his demurrer to the plea of defendant, Milton M. Lum, in words and figures as follows:

District Court of the United States, eastern district of Texas, at Galveston.

WILLIAM ROBERTSON, use &c.,
vs.
MILTON M. LUM et al.

And now comes the pltff., by his attorney, and says that the plea in abatement to said plaintiff's action, pleaded by Milton M. Lum, one of the defendants, is insufficient in law. And the said plaintiff here assigns the following causes of demurrer, to wit:

First. That the said plea shows no legal cause why the said plaintiff should not have and maintain his action herein for the use of the said Alexander C. Ferguson.

Second. That the said plea shows no legal cause why the said Alexander C. Ferguson may not use the name of the said William Robertson as plaintiff, for the purpose of bringing and maintaining this action.

Third. That the matters in said plea set forth are proper for the cognizance of a court of equity jurisdiction, but not for a court of law.

Fourth. That said plea shows no sufficient cause in abatement of said plaintiffs' action.

Wherefore, the said plaintiff prays judgment of the said plea, &c.

ALLEN & HALE,
Attys. for Plaintiff.

And afterwards, on the 5th day of August, 1858, the following proceedings was had in this cause:

WILLIAM ROBERTSON, use, &c.,
vs.
MILTON M. LUM. } 674.

On this day come the parties, by their attorneys, and thereupon came on to be heard the demurrer of plaintiff to the defendant's plea in abatement, heretofore filed; and after argument of counsel heard, because it seems to the court that the law upon said demurrer is for the plaintiff, it is ordered that the same be sustained, and that the said defendants answer further to the plaintiff's action.

And afterwards, on the fourth day of January, A. D. 1859, the

defendant, Milton M. Lum, by his attorney, filed his answer to plff's, petition, in words and figures as follows:

United States district court, eastern district of Texas, at Galveston.

WILLIAM ROBERTSON, use, &c.,
vs.
MILTON M. LUM et al

Now comes the defendant, Milton M. Lum, by his attorney, and says that plaintiff's petition is not sufficient in law, and he is not further bound to answer the same, wherefore he prays judgment, &c.

And for further answer, he denies all and singular the allegations in plaintiff's petition contained, and prays judgment, &c.

BALLINGER & JACK,
Defendants' Att'ys.

And for further answer, defendant again sets up, alleges and pleads the same matters and facts by him set forth in his plea filed herein on the 12th day of July, 1858, and says that the same are a bar to plaintiff's action herein; and that at the time the note sued on herein was made and executed to said Robertson, trustee as aforesaid, the said Robertson had collected enough of the assets of said bank to pay off all its liabilities and all expenses thereon, and had in fact paid off the same; by reason of all which the notes sued on were without any legal or valid consideration, and this he is ready to verify; wherefore he prays judgments, &c.

BALLINGER & JACK.

And afterwards, to wit, on the 26th day of May, 1859, the plaintiff, by his attorney, filed his demurrer to defendant's pleas, which is in words and figures, as follows:

District Court of the United States, eastern district of Texas, at Galveston.

WILLIAM ROBERTSON, use, &c.,
vs.
LUM.

And now comes the plaintiff, by his attorneys, and says that the last plea in the answer of the said defendants contained is not sufficient in law, and here shows to the court the following causes of demurrer:

First. That said plea does not contain or set forth any matters in bar of the said plaintiff's right of action.

Second. That said plea does not show any legal cause why the

said plaintiff should not have and maintain his action herein for the use of Alexander C. Ferguson.

Wherefore the said plaintiff pray judgment and costs.

ALLEN & HALE,
Att'ys for Pl'ff.

And afterwards, on the first day of June, A. D. 1859, the following proceeding was had in this cause, which is in words and figures as follows, to wit:

WILLIAM ROBERTSON, for the use of ALEXANDER C. FERGUSON, vs. MILTON M. LUM and LEWIS LUM. } 677.

This day came the plaintiff, by his attorney, and also came the defendant, Milton M. Lum, by his attorneys, and thereupon the plaintiff dismissed his action as against Lewis Lum, who had not been served with process; and thereupon the demurrer of the plaintiff to the last plea, with amended answer of the said Milton M. Lum, came on to be heard, because it seems to the court that the law is for the plaintiff, it is ordered that said demurrer be sustained and said plea overruled; and the demurrer of the said defendant to the petition of the plaintiff then coming on to be heard, because it seems to the court that the law is for the plaintiff, it is ordered that said demurrer be overruled; and thereupon came a jury of good and lawful men, to wit: William M. Phelps, Charles C. Frankland, William Saunderson, John J. Dunn, A. M. Miller, William Ferguson, John W. Burke, P. M. Carey, Jasper Terheun, Harvey W. Bentuk, Luke Bryan, and David H. Grove, who being elected, tried, empannelled, and sworn, and having heard the evidence, the argument of counsel, and charge of the court, returned the following verdict, to wit: We, the jury, find for the plaintiff ($5,113 06) five thousand one hundred and thirteen dollars and six cents.

DAVID H. GROVE,
Foreman.

Whereupon it is considered and adjudged by the court that the said plaintiff, William Robertson, who sues for the use of Alexander C. Ferguson, recover from the said defendant, Milton M. Lum, five thousand one hundred and thirteen $\frac{06}{100}$ dollars; and also the further sum of forty-four dollars, his costs in and about his suit incurred, for all which execution may issue.

And afterwards, to wit, on the second day of June, A. D. 1859, the defendant, Milton M. Lum, by his attorney, filed a power of attorney in words and figures as follows:

In United States Court, eastern district of Texas, at Galveston.

WILLIAM ROBERTSON, for the use of ALEXANDER C. FERGUSON, vs. MILTON M. LUM. } Law, No. 674.

Know all men by these presents, that I, Milton M. Lum, defendant in the above entitled suit, hereby authorize, empower, and request William P. Ballinger and Thomas M. Jack, esquires, of Galveston, jointly and severally, as my attorneys in fact, to execute for me and in my name any bond or bonds which may be necessary to prosecute a writ of error with supersedeas to the Supreme Court of the United States from any judgment which may be recovered against me in the above entitled cause in the United States district court at Galveston, and also any bond for costs in said Supreme Court, and to deliver the said bond or bonds to the proper parties, and to do and perform all things for me and in my name which are necessary or proper to perfect the said writ of error, and to take the said cause for adjudication to said Supreme Court.

Given under my hand and seal, using a scrawl for seal, this 15th day of December, 1858.

MILTON LUM. [SEAL.]

And afterwards, on the second day of June, A. D. 1859, the defendant, Milton M. Lum, filed his bond for writ of error as follows:

District Court of the United States, eastern district of Texas, at Galveston.

Know all men by these presents, that we, Milton Lum, as principal, and Thompson H. McMahon and M. V. McMahon, as his sureties, are held and firmly bound unto William Robertson, who sues for the use of Alexander C. Ferguson, in the sum of eleven thousand dollars, to be paid to the said William Robertson, his executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this 2d day of June, A. D. 1859:

The condition of this obligation is such, that whereas the said William Robertson, for the use of Alexander C. Ferguson, has recovered a judgment in the district court of the United States for the eastern district of Texas, at Galveston, against the said Milton Lum, for the sum of five thousand one hundred and thirteen dollars six cents, besides costs of suit, which said judgment was rendered on the first day of June, A. D. 1859, and bears interest from that date: and whereas the said Milton Lum, in order to obtain a reversal of the same, hath sued out a writ of error to the Supreme Court of the United States.

Now, therefore, if the above named Milton Lum shall prosecute his said writ of error to effect, and shall answer all damages and costs, and pay the said judgment, if he shall fail to make his plea good, then this obligation shall be void, otherwise the same shall remain in full force and virtue.

MILTON LUM, [SEAL.]
By W. P. BALLINGER, *Atto. in fact.*
T. H. McMAHON, [SEAL.]
M. V. McMAHON. [SEAL.]

Witness:
B. S. HULCHISS,
W. P. BALLINGER.

Approved: JOHN C. WATROUS.
June 2d, 1859.

And afterwards, the defendant sued out a writ of error with supersedas in this cause, in words and figures, as follows:

UNITED STATES OF AMERICA, *ss.*

The President of the United States to the honorable the judge of the district court of the United States for the eastern district of Texas, at Galveston, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment which is in the said district court before you, in an action between William Robertson, for the use of Alexander C. Ferguson, plaintiff, and Milton Lum, defendant, in a plea of debt, a manifest error has intervened, to the great damage of the said Milton Lum, as by his complaint has been stated, and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded, that if judgment thereof be given, then under your seal you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the chief justice and the associate justices of the Supreme Court of the United States on the first Monday of December next, at Washington, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right ought to be done.

Witness the Hon. Roger B. Taney, *esquire*, chief justice of the said Supreme Court, at Washington afs'd, this second day of June in the year of our Lord one thousand eight hundred and fifty nine, and of the independence of the United States the eighty-third.

[L. S.]

JAMES LOVE, *Clerk.*

And afterwards, on the third day of June, A. D. 1859, the following citation in error was filed by the defendant's attorneys:

UNITED STATES OF AMERICA, *ss.*

To William Robertson, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the eastern district of Texas, at Galveston, wherein Milton Lum is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in this behalf.

Witness the honorable John Charles Watrous, judge of the district court of the United States for the eastern district of Texas, at Galveston, this second day of May, in the year of our Lord one thousand eight hundred and fifty-nine.

JOHN C. WATROUS.

We, as attorneys of William Robertson, acknowledge service of the above citation. June 3d, 1859.

ALLEN & HALE.

United States of America, district court of the United States, eastern district of Texas, at Galveston.

I, James Love, clerk of the district court of the United States for the eastern district of Texas, at Galveston, certify that the foregoing twenty-five pages is a true and perfect transcript of the record and all the proceedings had in case six hundred and seventy-four on the law docket, wherein William Robertson, for the use of A. C. Ferguson, is plaintiff, and Milton Lum and Lewis Lum defendants.

In testimony whereof, I hereunto subscribe my name as clerk, and affix the seal of court, on the eleventh day of November, in the year of our Lord one thousand eight hundred and fifty-nine, and 84th year of the independence of the United States of America.

[SEAL.]

JAMES LOVE, *Clerk.*

Supreme Court of the United States.

DECEMBER TERM, 1867.—NO. 6.

MILTON LUM, *Plaintiff in Error*,

Against

WILLIAM ROBERTSON, who sues for the use of ALEXANDER C. FERGUSON, *Defendant in Error.*

Writ of Error to District Court of the U. States for Eastern District of Texas.

Supreme Court of the United States.

DECEMBER TERM, 1867.—NO. 6.

MILTON LUM, *Plaintiff in Error,*

Against

WILLIAM ROBERTSON, who sues for the use of ALEXANDER C. FERGUSON, *Defendant in Error.*

Writ of Error to District Court of the U. States for Eastern District of Texas.

ABSTRACT OF THE CASE.

At Natchez, on the 17th of July, 1851, Milton N. Lum and Lewis Lum made two joint and several promissory notes, whereby they promised to pay to William Robertson, by the name and description of William Robertson, trustee of the Commercial Bank of Natchez, or order, in specie, at the banking-house of the New Orleans Canal and Banking Company, in the City of New Orleans, as follows, to wit: by one of the notes the sum of $1,967.83, on the 17th July, 1853, and by the other of said notes the sum of $2,073.20, on the 17th July, 1854. Subsequent to the decision in *Bacon, &c. v. Robertson, &c.*, 18 How., 480, Alexander C. Ferguson was appointed receiver in the cause, and Robertson was ordered to deliver to Ferguson all the notes, choses in action, &c., which Robertson held as trustee of said bank. Accordingly, Robertson delivered to Ferguson the two promissory notes above-mentioned; and this action is brought thereon in Robertson's name, for the use of Ferguson. The plea of Defendant, William Lum, that Robertson had been *functus officio*, (pp. 4, 5, 6,) was, on

demurrer, held bad, (p. 7.) Being required to answer further, he pleaded again the same matter, with but little change. The Plaintiff's demurrer thereto was sustained, and a demurrer to the petition was overruled. Lewis Lum not being served with process, the action was dismissed as to him. Milton Lum denying the allegations in the petition, a jury was empannelled on the 1st of June, 1859, who found for the Plaintiff $5,113.06; and judgment was entered therefor with costs.

Points and Authorities.

I. The judgment is plainly right, and should be affirmed. Upon the judgment of forfeiture against the bank, and the appointment of Robertson, trustee, the debts due to the bank were *not* extinguished; but the *legal* title of all its property was vested in Robertson for the use of creditors of the bank so far as the debts might require. It was so settled in Mississippi, in cases which the counsel for *Plaintiff in* error has himself cited, to-wit: *Nevitt* v. *Bank of Port Gibson*, 6 Smedes & Marshall, 513; and *Com. Bank* v. *Chambers, &c.*, 8 Id., 49. Subsequent to *Coulter* v. *Robertson*, 24 Miss., 278, to-wit: in 1853, the High Court of Errors and Appeals again held, according to previous adjudications, that the *legal* title to all the property, including the choses in action, which belonged to the bank, was vested in Robertson, the trustee; and that he was authorized to sue for and collect the note in question in *Bingamon, &c.*, v. *Robertson*, 25 Miss., 416. This Court has since held that he is a trustee, not only for creditors of the bank, but also for its stockholders. *Bacon, &c.*, v. *Robertson, &c.*, 18 How., 488. This decision is conclusive against the plea, so far as the *merits* are concerned. If, as the Defendant alleges, all the creditors of the bank are paid, then, under the decision of this Court in *Bacon* v. *Robertson*, the recovery on the notes will be for the benefit of the stockholders.

Not only is it established that it does not lie in the debt-

ors mouth to avoid his contract, which, as between him and his creditor, was made on sufficient consideration, but it is equally well established that he cannot make a valid objection to a recovery in the Plaintiff's name. *Little* v. *O'Brien*, 9 Mass., 427.

In a case before the Supreme Court of North Carolina, in 1839, *Gaston*, J., said: "The expiration of the charter of the bank, whereof the Plaintiff was cashier at the time of the execution of the note on which he brought this action, is a circumstance which in no way affects his right to recover the debt demanded. It was due to him personally. The word 'cashier' was but descriptive of the individual to whom the note was made payable. The legal interest of the debt was in the Plaintiff. The action was properly brought by him, and the judgment rendered for him in his natural capacity. Whether he was a trustee for the bank, or any other person, is an inquiry with which a court-of-law has no concern." *Horah* v. *Long*, 4 Dev. & Bat., 275.

In the present case, Robertson must be deemed, on the record, the *legal* owner, and he can sue as trustee for the persons having real interest. *Lovell* v. *Evertson*, 11 Johns., 53; *Sterling* v. *Marietta & Susquehanna Trading Co.*, 11 S. & R., 181; *Brigham* v. *Marean*, 7 Pick., 40; *Adams* v. *Oakes*, 6 C. & P., 70, 25 Eng. C. L. It is no ground of defence that the beneficial interest is in others, or that the Plaintiff, when he recovers, will be bound to account for the proceeds to others. *Fairfield* v. *Adams*, 16 Pick., 383. Where the Defendant has no legal or equitable defence to the bill or note, as against the real owner thereof, he cannot be permitted to show the that nominal Plaintiff, in whose name the suit is so brought, is not the real party in interest. *Morton* v. *Rogers*, 14 Wend., 580; *Burckmyer, &c.*, v. *Whiteford*, 6 Gill, 16 The rule thus established in England and the Northern States, is equally well established in Virginia. *Clarksons* v. *Doldridge, &c.*, 14 Grat., 44; and in Texas. In this State

the cases are numerous in which it has been held that the party to whom a note is payable, or who has the legal title and possession of it, may sue in his own name, although the equitable title is in another. *Thompson* v. *Cartwright*, 1 Texas, 87; *McMillan* v. *Croff*, 2 Ib., 297; *Fowler, &c.*, v. *Willis*, 4 Ib., 46; *Knight* v. *Holloman*, 6 Ib., 153; *Butler* v. *Robertson*, 11 Ib., 142; *Wimbish* v. *Holt*, 26 Ib., 675. According to the rule thus well established, though the notes were executed to Robertson by the name and description of trustee of the bank, and he has relinquished his trust, and delivered the notes to Ferguson as receiver, yet the action on the notes is properly maintained in Robertson's name, and the recovery will be for the benefit of those who are really in interest. *Cartwright, &c.*, v. *Gardner*, 5 Cush., 275; *Poirier* v. *Morris*, 2 El. & Bl. 89, 75 Eng. C. L.; *Law* v. *Parnell*, 7 Com. B. (J. Scott) N. S. 282, 97 Eng. C. L. This Court, in 1861, thought it unnecessary to discuss such a question in *O'Brien* v. *Smith*, 1 Black., 100. And it must certainly be unnecessary now.

II. Under such circumstances, it must be wholly useless to examine reports of cases in ejectment as to the right of action of a trustee of land. The cases of that sort cited for Plaintiff in error, to-wit: *Doe dem. White* v. *Simpson, &c.*, 5 East., 162; *Doe dem. Woodcock* v. *Barthrop*, 5 Taunt., 382, 1 Eng. C. L.; *Doe dem. Player* v. *Nicholls*, 2 Dow. & Ry., 480, 16 Eng. C. L., and *Brown* v. *Doe dem. Weasl's heirs*, 7 How., (Mississippi) 181, give additional support to the inference, justified by the other circumstances, that the writ of error which has delayed the proceedings on the judgment, was sued out merely for delay. Damages should therefore be awarded at the rate of ten per centum per annum on the amount of the judgment.

CONWAY ROBINSON
AND
WILLIAM G. HALE,
} *For Def't in error.*

Supreme Court of the United States.

DECEMBER TERM, 1866.

No. 12.

MILTON M. LUM, Plaintiff in Error, *vs.* WILLIAM ROBERTSON, use of Alexander C. Ferguson, Defendant in Error.	In Error to the District Court of the United States for the Eastern District of Texas.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This suit was brought in the District Court of the United States for the Eastern District of Texas, in the name of William Robertson, for the use of Alexander C. Ferguson, cititizens of the State of Mississippi, against Milton M. Lum and Lewis Lum, citizens of Texas, on two promissory notes made at Natchez, Mississippi, on the 17th day of July, 1851, by the said Milton M. and Lewis Lum, in favor of the said William Robertson, as Trustee of the "Commercial Bank of Natchez," or order: one of said notes being for the sum of $1,967.83, payable on the 17th day of July, 1853, and the other, for the sum of $2,073.20, payable on the 17th day of July, 1854. (Record, pp. 1, 2.)

The said Lewis Lum, not having been served with process, the suit, as against him, was dismissed, and the action was prosecuted against the other Defendant, Milton M. Lum.

The facts of the case, as set forth in the Defendant's pleas, and admitted by the demurrers of the Plaintiff, (Record, pp. 4–9,) are substantially as follows:

Prior to the making of the said promissory notes, an information in the nature of a *quo warranto*, was instituted

by the State of Mississippi, in the Circuit Court of Adams county, in said State, against the said bank, under which its charter was declared forfeited, and the corporation was judicially dissolved, in pursuance of an act of the Legislature of said State, entitled "An Act to prescribe the mode of proceeding against incorporated banks, for a violation of their corporate franchises, and against persons pretending to exercise corporate privileges under acts of incorporation, and for other purposes," approved July 26, 1843.—Hutchinson's Mississippi Code, 329.

Under the provisions of the 8th section of said act, (Hutchinson's Code, 331) the said Robertson was, by an order of said Court, appointed Trustee, for the purposes set forth in said section, "to take charge of the assets and books of said Commercial Bank of Natchez, wherever the same might be found, either in the possession of said bank, or their officers, agents, trustees, or attorneys; to sue for and collect all debts due to said bank, and to sell and dispose of all property, real and personal, owned by said bank, or held by others for its use," and "the proceeds of the debts when collected, and of the property when sold, to apply as might be thereafter directed by law, to the payment of the debts of the said Commercial Bank of Natchez."

The "foregoing, and no others, were the appointment, power and authority of the said William Robertson, as trustee of said Commercial Bank of Natchez," and "he never had any other right, title or interest, as said trustee, except such as was conferred by virtue of such appointment and order of said court, and the said act of July 26, 1843, in accordance with which the same was made;" and the said promissory notes "were executed on account of an indebtedness to the said Commercial Bank, and the consideration thereof wholly and solely moved from, and was due to, said bank," and "said notes were executed to said Bobertson, in his official character and right, as trustee as aforesaid, and in no other character or right, and

without any personal right, title, or interest thereto or therein, by said Robertson."

Subsequently, it appearing to the satisfaction of the said court "that said Robertson had faithfully and fully discharged all his duties as trustee, and had fully satisfied and paid all legal claims against the trust fund in his hands," it was "considered, ordered, adjudged and decreed," "that the said Robertson be finally discharged and exonerated from all the rights and duties conferred upon him, by virtue of his appointment as such trustee," &c.

Afterwards, in a certain suit brought in the Circuit Court of the United States for the Southern District of Mississippi, the said Alexander C. Ferguson was, by a decree of said Court, duly appointed a Receiver in said cause, "and the said William Robertson was ordered to deliver to the said Ferguson, all the moneys, bonds, notes, deeds, accounts, choses in action, and property of all kinds which the said Robertson held as late trustee of the said Commercial Bank of Natchez, which said money, deeds, choses in action and other property, the said Ferguson, as receiver as aforesaid, was by the said decree, empowered to hold and possess," "and the said Ferguson duly qualified as receiver thereunder, and the said Robertson duly delivered to the said Ferguson, in accordance therewith, the said promissory notes."

And at the time the said notes were made and executed to the said Robertson, Trustee as aforesaid, he had collected of the debts, effects and property of said bank, an amount of money sufficient to pay off all its debts, and all costs, charges and expenses incident to the performance of his said trust, and had, in fact, paid off the same, and thereby became *functus officio*, and was further expressly removed from his said office of Trustee, as aforesaid.

The Plaintiff demurred to the Defendant's pleas; the Court sustained the demurrers, and under the charge of the Court, the Jury found for the Plaintiff. (Record, p.

9.) And, thereupon, the case is brought to this Court, by writ of error; and the matter for determination is, whether the said pleas present a valid defence to the said action.

POINTS AND AUTHORITIES.

The following points and authorities will be relied on, for the Plaintiff in Error:

First: The said promissory notes—the consideration whereof wholly and solely moved from, and was due to, the said Commercial Bank of Natchez—having been made to the said William Robertson solely in his official character and right as Trustee of the said Bank, and without any personal right, title and interest thereto or therein, by the said Robertson; and the said Robertson having, prior to the commencement of said suit, paid off all the debts of said Bank, and all costs and charges incident to the performance of said trust—having fully discharged and executed all his duties of Trustee—having been finally discharged and exonerated from all the rights and duties conferred on him by virtue of his appointment as such Trustee, and having been expressly removed from his said office, and become *functus officio;* he, thereby, became divested of all his right, title and interest, both legal and equitable, in and to the said promissory notes; and it was, consequently, not competent for him to have and maintain his said action.—Doe. dem. Player *vs.* Nichols, 2 Dowling and Ryland, 458; Doe *vs.* Barthrop, 5 Taunton, 382; Doe *vs.* Simpson, 5 East, 162; Brown *vs.* Weast, 7 Howard, (Miss.) 181; Fox *vs.* Horah, 1 Iredell Ch. R., 358.

Second: A judgment of forfeiture having been pronounced against the said Commercial Bank of Natchez, by a Court of competent jurisdiction, under the said statute of the State of Mississippi, and the said corporation having thereby been dissolved, the debts remaining due thereto, after the payment of all its liabilities, were ex-

tinguished, and neither the stockholders, nor directors, nor trustees can recover the same. This was expressly decided by the Supreme Court of Mississippi, on the fullest consideration, in the case of Coulter *et al. vs.* Robertson, 24 Mississippi, 278. And the case of the Commercial Bank of Natchez *vs.* Chambers, (8 Smedes and Marshall, 1) and that of Nevitt *vs.* Bank of Port Gibson, (6 Smedes and Marshall, 513) were decided on the same principle.

Third: The decision of this cause, involving, as it does, the construction of a statute of the State of Mississippi, and the Supreme Court of said State, having, in the cases above cited, placed a construction on said statute, this Court will adopt that construction. This rule is so well settled by numerous decisions of this Court, that no citation of authorities in support thereof, is deemed necessary.

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